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Civil Rights and the Low-Wage Worker

In fall 2008, as the economy was collapsing, the *Legal Forum* hosted a symposium to discuss civil rights and the low-wage worker. Academics and practitioners engaged in an interdisciplinary discussion of low-wage work, low-wage workers, and workers' rights. Drawing on ideas from social movement theory, law and economics, and political theory, among others, the authors in this Volume discuss civil rights and the low-wage worker from all angles. As the United States repositions itself in the global economy, Volume 2009 provides timely and comprehensive analysis of the future of low-wage workers and workers' rights. Together, these authors challenge dominant views of workers' civil rights, explore the future of low-wage work in the United States, analyze the state of workplace discrimination, and problematize existing legal structures that are aimed at protecting workers' rights.

Noah Zatz, David Weisbach, and Maria Ontiveros question the predominant views of workers' civil rights and existing legal protections. Zatz takes a first step towards integrating labor and civil rights by discussing the minimum wage as an alternative regime of civil rights protections for low-wage workers, not just as an antipoverty economic tool. Antidiscrimination law and the minimum wage both aspire to remedy social injustice and within that framework, the minimum wage can be defended as a civil rights statute, notwithstanding its weaknesses as an antipoverty tool. More specifically, Zatz argues, the minimum wage operates as an accommodation mandate, compensating for the morally arbitrary fact that the labor of low-wage workers may be valued too little in the market. Just as the Americans with Disabilities Act requires employers to accommodate an employee's physical handicaps so that the employee may perform their job, the minimum wage requires employers to accommodate an employee's inability to receive adequate wages for their work in the labor market. Looking at the minimum wage in this manner, we can appreciate that while the minimum wage might not target *poverty* as effectively as, say, the Earned Income Tax Credit, it precisely targets *earning capacity*. By beginning the discussion of minimum wages as civil rights, Zatz simultaneously overcomes a common hurdle in discussing the utility of the minimum wage, and introduces (or at least modifies) a normative framework for discussing low-wage work and low-wage workers.

David Weisbach, in contrast, avoids any normative discussion of accommodations mandates and instead proposes an alter-

native way to determine efficient disability policy. He suggests a welfarist theory of distributive justice to disability policy, wherein the quality and quantity of resource redistribution towards disabled workers would depend on how the disability affects the individual's well-being. This ensures that the disabled individual's contributions to society and consequent resource redistribution is proportional to the individual's abilities, while at the same time reduces the risk that people will feign disabilities to receive more public resources. If a disability is observable, direct redistribution through the income tax structure should be utilized. If disabilities are nonobservable, Weisbach recommends commodity taxes or in-kind provision of goods that the disabled are more likely to consume.

Just as our understanding of "civil rights" needs modification, so does our understanding of "low-wage work." Michael Selmi takes a step back and examines the future of low-wage work and low-wage workers and proposes policy solutions to improve the quality of work and lives of low-wage workers. While one common strategy is to rely on union organizing to improve the working conditions of low-wage work, Selmi argues that a more promising, long-term strategy would be to change the employment prospects of low-wage workers so that they may transition to higher-wage jobs. That is, the best solution is not to change low-wage work, but to change low-wage workers. He focuses on changes in education—or human capital investments—so that low-wage workers may improve their market position. By creatively modifying community colleges, vocational schooling, and charter schools, education may become more relevant to low-wage workers and directly contribute to their human capital.

As civil rights and low-wage work become redefined in the 21st century, so must our analysis of workplace discrimination. Devah Pager and her coauthors, Bruce Western and David Pedulla, and Michael Stoll, and Leticia Saucedo examine discrimination in the workplace from three different angles. Devah Pager and her coauthors examine empirical trends in the low-wage labor market and hiring practices in New York City. From this data they consider the implications of these trends in labor force participation and the cyclical, self-reinforcing relationship between hiring discrimination and minority low-wage workers.

Relatedly, Michael Stoll empirically examines the effect of criminal background checks on the hiring prospects of ex-offenders and black men. Stoll disaggregates hiring data for ex-offenders and recommends that in order to increase the hiring

prospects of ex-offenders and black men, legal requirements for background checks should be softened in order to soften employers' negative attitudes towards hiring ex-offenders.

Leticia Saucedo applies three theories of workplace discrimination—structuralist, performance identity, masculinities—to the brown collar worker to demonstrate the discriminatory dynamics that immigrant workers experience after they have been hired, which prevent real integration into the workplace. Workplace discrimination is therefore not limited to hiring or firing practices, but extends into the everyday workplace dynamics. Moreover, by applying theories of workplace discrimination to immigrant workers, Saucedo demonstrates that workplace discrimination has little to do with the legal “right” to a job, but has more to do with workplace dynamics. In this framework, then, immigrant workers should be entitled to all of the antidiscrimination protections that native workers enjoy.

Since our understanding of discrimination must be updated to reflect current realities, it is unsurprising that existing legal frameworks that are aimed at protecting workers must also be revisited. Scott Cummings, Maria Ontiveros, Kathleen Kim, and Ruben Garcia all problematize the existing legal structure of worker protections in the United States and offer new frameworks for conceptualizing workers' rights. Scott Cummings explores how local governments have improved the working conditions for low-wage workers, by imposing minimum work standards, rewarding “good” employers, creating job training opportunities, and enabling collective action. He analyzes nine local worker initiatives passed in Los Angeles from 1997 to 2008. By examining which reforms succeeded, and which did not, his analysis may be instructive for labor activists across the country.

Maria Ontiveros identifies the gap between antidiscrimination laws and the civil rights of workers and explains how neither regime adequately protects low-wage workers. Moreover, Ontiveros points out that low-wage workers lack a collective, national change agent that can work to protect the civil rights of low-wage workers on a national scale. She provides an overview of recent legal victories on behalf of low-wage workers and explains how these victories can be a model for organizing that provides both a rights framework *and* mobilizing a social movement. Specifically, she argues that international treaties and constitutional theories can provide a coherent rights framework; and coalitions and labor unions can work together to create a

movement of social movement unionism, and act as a change agent.

Similarly, Kathleen Kim identifies another tension between United States immigration law and workers' civil rights, both in their conflicting objectives and their divergent enforcement mechanisms. While immigration law seeks to exclude people from the United States and is enforced by public entities, workers' civil rights laws seek to eliminate discrimination in the labor market and are enforced by private plaintiffs. Moreover, the current legal system prioritizes immigration enforcement over workers' civil rights, so that undocumented workers who bring claims of civil rights violations are often deported pursuant to immigration laws, while workers' rights violations are left unenforced. Drawing on legal concepts from human trafficking law, where a similar tension between immigration and civil rights emerges, Kim argues that workers' civil rights should take priority over immigration enforcement. More specifically, she proposes that undocumented workers, like trafficked workers, should be able to act as private attorneys general and bring causes of action against employers for civil rights violations.

Finally, Ruben Garcia discusses the political contingency of worker protections in the United States and urges incorporation of international human rights norms in worker protection laws. In doing so, Garcia argues, workers' rights will become translated into fixed norms that are not susceptible to the "pendulum" of politics.

This Volume's Student Comments also explore a wide range of issues not touched upon in the Articles. Greg Cheyne explores facially discriminatory policies in homeless shelters, a unique and notable gap in the Fair Housing Act. His Comment makes a valuable contribution to the discussion of facially discriminatory policies and highlights some of the negative implications of these policies, which are often overlooked. Austin Hampton examines another aspect of fair housing and analyzes the liability of landlords who refuse to participate in the voluntary Section 8 Housing Choice Voucher Program, as a veiled means of circumventing the Fair Housing Act's prohibition against discrimination. He urges application of the disparate impact, rather than discriminatory intent, doctrine in these cases. This, he argues, will more precisely distinguish "honest" landlords who do not participate in the voucher program for legitimate reasons, from "devious" landlords who do so for discriminatory reasons.

Jennifer Senior is concerned that a prevalent judicial approach to reviewing state ballot accessibility legislation strays from the foundational principles underpinning a system of direct democracy, unintentionally favoring well-funded initiative sponsors rather than those that are widely supported by the public. Her solution is to suggest that courts ought to consider the impact of First Amendment rulings not just on the complaining party, but on all potential initiative sponsors within the state, much as courts have done in other voting rights contexts.

Finally, Benjamin Burry explores whether the FLSA and Title VII apply to workfare participants under President Clinton's Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"). Burry explores the policy and judicial implications of extending such protections and concludes that FLSA and Title VII should not be extended to protect workfare participants.

Together, these Articles and Comments reexamine the state of civil rights and the low-wage worker. As American industries are adjusting to new economic realities, this Volume takes the first crucial step at reframing the discussion of low-wage work and civil rights in America.

